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The Uncomfortable Truths and Double Standards of Bribery Enforcement

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THE UNCOMFORTABLE TRUTHS AND DOUBLE STANDARDS OF BRIBERY ENFORCEMENT

Mike Koehler*

In recent years, Foreign Corrupt Practices Act (FCPA) enforcement has become a top priority for the U.S. government, and government enforcement officials have stated that “we in the United States are in a unique position to spread the gospel of anti-corruption” and that FCPA enforcement ensures not only that the United States “is on the right side of history, but also that it has a hand in advancing that history.”¹

However, the FCPA is not the only statute in the federal criminal code concerning bribery. Rather, the FCPA was modeled in large part after the U.S. domestic bribery statute, and when speaking of its FCPA enforcement program, the government has recognized that it “could not be effective abroad if we did not lead by example here at home.”² Indeed, the policy reasons motivating Congress to enact the FCPA—that corporate payments were subverting the democratic process, undermining the integrity and stability of government, and eroding public confidence in basic institutions—apply with equal force to domestic bribery.

Against this backdrop, this Article explores through various case studies and examples whether the United States’s crusade against bribery suffers from uncomfortable truths and double standards. Through these case

* Assistant Professor, Southern Illinois University School of Law; founder and editor of the website “FCPA Professor” (www.fcpaprofessor.com); author of the book *THE FOREIGN CORRUPT PRACTICES ACT IN A NEW ERA* (2014). The issues covered in this Article assume the reader has sufficient knowledge and understanding of the FCPA, FCPA enforcement (including the role of the Department of Justice and Securities and Exchange Commission in enforcing the FCPA), and the resolution vehicles typically used to resolve FCPA scrutiny. Interested readers can learn more about these topics and others by visiting Professor Koehler’s website (<http://www.fcpaprofessor.com>), specifically the FCPA 101 page (<http://www.fcpaprofessor.com/fcpa-101>). This Article is part of a symposium entitled *Fighting Corruption in America and Abroad* held at Fordham University School of Law. For an overview of the symposium, see Jed Handelsman Shugerman, *Foreword: Fighting Corruption in America and Abroad*, 84 *FORDHAM L. REV.* 407 (2015).

1. Lanny A. Breuer, Assistant Attorney Gen. of the Criminal Div., Dep’t of Justice, Address at the American Conference Institute’s 28th National Conference on the Foreign Corrupt Practices Act (Nov. 16, 2012), <http://www.justice.gov/opa/speech/assistant-attorney-general-lanny-breuer-speaks-american-conference-institute-s-28th> [<http://perma.cc/UYA4-MLCJ>].

2. Lanny A. Breuer, Assistant Attorney Gen. of the Criminal Div., Dep’t of Justice, Address at the Franz-Hermann Brüner Memorial Lecture at the World Bank (May 25, 2011), <http://www.justice.gov/criminal/pr/speeches/2011/crm-speech-110525.html> [<http://perma.cc/B2VD-F42Q>].

studies and examples, readers can decide for themselves whether the U.S. government “practices what it preaches” when it comes to the enforcement of bribery laws and whether the United States is indeed “in a unique position to spread the gospel of anti-corruption.”

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INTRODUCTION

In recent years, Foreign Corrupt Practices Act³ (FCPA) enforcement has become a top priority for the U.S. government. Government enforcement officials have stated that “we in the United States are in a unique position to spread the gospel of anti-corruption”⁴ and that FCPA enforcement ensures not only that the United States “is on the right side of history, but also that it has a hand in advancing that history.”⁵ However, the FCPA is not the only statute in the federal criminal code concerning bribery. Rather the FCPA was modeled in large part after the U.S. domestic bribery statute,⁶ and when speaking of its FCPA enforcement program, the government has recognized that it “could not be effective abroad if we did not lead by example here at home.”⁷ To best assess whether the U.S. crusade against bribery suffers from uncomfortable truths and double standards, Part I of this Article

3. 15 U.S.C. § 78dd-1 (2012).

4. Breuer, *supra* note 1.

5. *Id.*

6. 18 U.S.C. § 201 (2012).

7. Breuer, *supra* note 2.

highlights relevant background regarding the FCPA, including the policy reasons motivating Congress to enact the FCPA.

Against this backdrop, Part II of this Article uses various case studies to explore whether the U.S. crusade against bribery suffers from uncomfortable truths. These uncomfortable truths include the following examples: (i) how the U.S. government actively participated in bribery; (ii) how the highest levels of the U.S. government knowingly engaged in and supported private bribery; (iii) how the identity of the alleged bribe payer influenced the U.S. government's enforcement of bribery laws; (iv) the subtle difference between U.S. government and private sector attempts to influence foreign government action; and (v) how the U.S. government employs overblown and inconsistent rhetoric regarding bribery enforcement.

Part III of this Article explores through various case studies whether the U.S. crusade against bribery suffers from double standards. These double standards include: (i) a variety of direct and indirect corporate interactions with U.S. political actors; (ii) corporate interaction with U.S. healthcare providers; and (iii) corporate hiring practices.

Through these case studies and examples, readers can decide for themselves whether the U.S. government "practices what it preaches"⁸ when it comes to enforcement of bribery laws and whether the United States is indeed "in a unique position to spread the gospel of anti-corruption."⁹

I. RELEVANT BACKGROUND

Prior to assessing whether the U.S. crusade against bribery suffers from uncomfortable truths and double standards, it is first necessary to highlight relevant background regarding the FCPA, including the policy reasons motivating Congress to enact the FCPA.

In the mid-1970s, Congress journeyed into uncharted territory. After more than two years of investigation, deliberation, and consideration of the so-called foreign corporate payments problem, the FCPA emerged in 1977.¹⁰ The FCPA was a pioneering statute and the first law in the world governing *domestic* business conduct with *foreign* government officials in *foreign* markets.

As with most new laws, the FCPA did not appear out of thin air. Rather, real events and real policy reasons motivated Congress to act and pass the FCPA. Indeed, as relevant to the subject of this Article, discovery of the so-called foreign corporate payments problem resulted in part from the work of the Office of the Watergate Special Prosecutor.¹¹ As noted in *The Report of the Securities and Exchange Commission on Questionable and*

8. *See id.*

9. Breuer, *supra* note 1.

10. For an overview of the FCPA's extensive legislative history, see Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 929, 980–1002 (2012).

11. *See id.* at 933.

Illegal Corporate Payments and Practices ("SEC Report"), a report Congress relied upon in enacting the FCPA,

In 1973, as a result of the work of the [Watergate Prosecutor,] several corporations and executive officers were charged with using corporate funds for illegal *domestic* political contributions. The Commission recognized that these activities involved matters of possible significance to public investors, the nondisclosure of which might entail violations of the federal securities laws. . . . These secret funds were used for a number of purposes, including in some instances, questionable or illegal foreign payments.¹²

Along with the SEC's work, Senator Frank Church's Subcommittee on Multinational Corporations ("Church Committee") also helped shine a light on questionable corporate conduct. In 1975, the Church Committee held the first of several hearings generally dealing with U.S. corporate political contributions to foreign governments. In opening the hearing, Senator Church stated:

In the course of the Watergate Committee hearings and the investigation by the Special Prosecutor, it became apparent that major American corporations had made illegal political contributions *in the United States*. More recently, the Securities Exchange Commission has revealed that several multinational corporations had failed to report to their shareholders millions of dollars of offshore payments in violation of the Securities laws of the United States.¹³

In short, during Congress's multi-year deliberation and consideration of the foreign corporate payments problem, Congress was well aware that the problem had domestic analogues.¹⁴

Of further relevance to the subject of this Article was the main motivation of Congress in enacting the FCPA. As Senator Church stated:

Several oil companies testified before the subcommittee that they had made huge political contributions in Italy and Korea, for example. They claimed to be supporting the democratic forces who are friendly to foreign capital in those countries, but in fact, they were subverting the basic democratic processes of those two countries by making illegal contributions and were, at the same time, providing the radical left with its strongest election issue. The large and steady gains made by the Italian Communist Party in recent elections are due in no small part to the fact that it is believed to be the only non-corrupt political force in the

12. SEC, REPORT OF THE SECURITIES AND EXCHANGE COMMISSION ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES 2-3 (1976), <https://www.sec.gov/spotlight/fcpa/sec-report-questionable-illegal-corporate-payments-practices-1976.pdf> [http://perma.cc/QMM2-NV8J].

13. *Multinational Corporations and United States Foreign Policy: Hearings Before the Subcomm. on Multinational Corps. of the S. Comm. on Foreign Relations*, 94th Cong. 1 (1975) (emphasis added).

14. See *The Activities of American Multinational Corporations Abroad: Hearings Before the Subcomm. on Int'l Econ. Policy of the H. Comm. on Int'l Relations*, 94th Cong. 1, 13 (1975). The SEC Chairman noted, "Similar payments, at the local level, anyway, are not unknown in the United States." *Id.* at 61.

country, while the other parties are seen as the handmaidens of foreign and domestic financial interests.¹⁵

Representative John Moss likewise stated:

Business practices of these corporations abroad often impact directly on U.S. foreign policy. Disclosures have shown that United Brands dealings with a Honduran Government and Lockheed's relationship with the Dutch Crown, Italian political parties, and former key leaders of the ruling Japanese party had an impact as great as the Department of State might have had.

Surely the public expects more than to have foreign policy made in the board rooms of United Brands or Lockheed. Not only is a publicly owned corporation unaccountable to the public when it uses its assets to bribe foreign governmental officials, but also it is unaccountable to its shareholders, the ones to whom the assets belong.¹⁶

As highlighted by the above statements, Congress's main motivation in passing the FCPA was not an altruistic, post-Watergate morality mindset as is often portrayed in connection with the FCPA's enactment,¹⁷ but rather selfish and political: congressional leaders wanted to make foreign governments and foreign political parties accountable and answerable to the U.S. government itself, as opposed to private enterprises because of improper payments.

Against this backdrop, President Jimmy Carter signed the FCPA into law in 1977. In pertinent part, President Carter's signing statement noted:

During my campaign for the Presidency, I repeatedly stressed the need for tough legislation to prohibit corporate bribery. [The FCPA] provides that necessary sanction.

I share Congress [sic] belief that bribery is ethically repugnant and competitively unnecessary. Corrupt practices between corporations and public officials overseas undermine the integrity and stability of governments and harm our relations with other countries. Recent revelations of widespread overseas bribery have eroded public confidence in our basic institutions.

This law makes corrupt payments to foreign officials illegal under United States law.¹⁸

In recent years, FCPA enforcement has become a top priority of the U.S. government. Indeed, of the nearly 900 federal statutes the Department of Justice (DOJ) Criminal Division enforces, the FCPA is one of the DOJ's "top priorities," and the DOJ has stated that its "focus and resolve in the

15. *Protecting the Ability of the United States to Trade Abroad: Hearing Before the Subcomm. on Int'l Trade of the S. Comm. on Fin.*, 94th Cong. 9 (1975).

16. *Foreign Payments Disclosure: Hearings Before the Subcomm. on Consumer Prot. and Fin. of the H. Comm. on Interstate and Foreign Commerce*, 94th Cong. 152 (1976) [hereinafter *Foreign Payments Disclosure*].

17. See, e.g., Kevin E. Davis, *Why Does the United States Regulate Foreign Bribery: Moralism, Self-Interest, or Altruism?*, 67 N.Y.U. ANN. SURV. AM. L. 497, 497 (2012).

18. Presidential Statement on Signing the Foreign Corrupt Practices and Investment Disclosure Bill 1977, 13 WEEKLY COMP. PRES. DOC. 1909 (Dec. 20, 1977).

FCPA area will not abate.”¹⁹ The DOJ has a specific FCPA Unit and in 2010 declared a “new era of FCPA enforcement,” emphasizing that “we are here to stay.”²⁰ Likewise, in 2010, the Securities and Exchange Commission (SEC), which also enforces the FCPA as to publicly traded companies and associated persons, created a specialized FCPA Unit (one of only five specialized units at the SEC) and declared that the FCPA would be a “vital part” of its overall enforcement program.²¹

In 2012, the DOJ escalated its rhetoric concerning FCPA enforcement and stated:

[W]e in the United States are in a unique position to spread the gospel of anti-corruption, because there is no country that enforces its anti-bribery laws more vigorously than we do. The Justice Department’s record of accomplishment in this area is a signature achievement of ours²²

During this new era of FCPA enforcement, those subject to the FCPA have been frequently reminded that “robust FCPA enforcement has become part of the fabric of the Justice Department” and that its “global anti-corruption mission has seeped into the Criminal Division.”²³ In the words of the DOJ, FCPA enforcement is “our way of ensuring not only that the Justice Department is on the right side of history, but also that it has a hand in advancing that history.”²⁴

Against the backdrop of a new era of FCPA enforcement and lofty government rhetoric is the fact that the FCPA is not the only statute in the federal criminal code concerning bribery. In fact, the 1977 FCPA was modeled in large part after the U.S. domestic bribery statute passed in 1962.²⁵

When speaking of its FCPA enforcement program, the DOJ has recognized, at least rhetorically, that the United States “could not be effective abroad if we did not lead by example here at home.”²⁶ More specifically, the DOJ stated:

[T]he bottom line is this: At home, we pursue corruption at every level. This is important for our domestic stability—it strengthens the legitimacy of our democratic institutions, and shows that no person here is above the

19. Lanny A. Breuer, Assistant Attorney Gen. of the Criminal Div., Dep’t of Justice, Address at the Tenth Annual Pharmaceutical Regulatory and Compliance Congress Best Practices Forum (Nov. 12, 2009), http://www.ehcca.com/presentations/pharmacongress10/breuer_2.pdf [<http://perma.cc/3DZF-FKKY>].

20. Lanny A. Breuer, Assistant Attorney Gen. of the Criminal Div., Dep’t of Justice, Address at the 24th National Conference on the Foreign Corrupt Practices Act (Nov. 16, 2010), <http://www.justice.gov/opa/speech/assistant-attorney-general-lanny-breuer-speaks-24th-national-conference-foreign-corrupt> [<http://perma.cc/HFM4-SLZM>].

21. Cheryl J. Scarboro, Chief of the Foreign Corrupt Practices Act Unit, SEC, Remarks at News Conference Announcing New SEC Leaders in Enforcement Division (Jan. 13, 2010), <http://www.sec.gov/news/speech/2010/spch011310newsconf.htm#scarboro> [<http://perma.cc/YLM5-QN52>].

22. See Breuer, *supra* note 1.

23. *Id.*

24. *Id.*

25. See 18 U.S.C. § 201 (2012).

26. Breuer, *supra* note 2.

law; and it is important for the work we do internationally—it shows the global community that we practice what we preach.²⁷

Borrowing from the DOJ's verbiage, "the bottom line" appears to be this: as highlighted in this Article through various case studies and examples, the U.S. crusade against bribery suffers from several uncomfortable truths and double standards. Through the various case studies and examples presented in Part II, readers can decide for themselves whether the U.S. government "practices what it preaches"²⁸ when it comes to enforcement of bribery laws and whether the U.S. is indeed "in a unique position to spread the gospel of anti-corruption."²⁹

II. UNCOMFORTABLE TRUTHS REGARDING THE U.S. CRUSADE AGAINST BRIBERY

There are several uncomfortable truths regarding the U.S. crusade against bribery including the following: (i) how the U.S. government actively participated in bribery; (ii) how the highest levels of the U.S. government knowingly engaged in and supported private bribery; (iii) how the identity of the alleged bribe payer influenced the U.S. government's enforcement of bribery laws; (iv) the subtle difference between U.S. government and private sector attempts to influence foreign government action; and (v) how the U.S. government employs overblown and inconsistent rhetoric regarding bribery enforcement.

The above uncomfortable truths should cause pause and reflection about whether the U.S. government does indeed "practice what it preaches"³⁰ when it comes to enforcement of bribery laws and whether the United States is indeed "in a unique position to spread the gospel of anti-corruption."³¹

A. *The U.S. Government As an Active Participant in Bribery*

In 2010, Bobby Elkin, Jr. pleaded guilty to a one-count criminal information charging conspiracy to violate the FCPA for paying and authorizing the payment of bribes to Kyrgyz officials in order to secure business for his tobacco company employer.³² At sentencing, the DOJ requested that U.S. District Court Judge Jackson Kiser (W.D. Va.) sentence Elkin to thirty-eight months in federal prison.³³ However, Judge Kiser saw

27. *Id.*

28. *See id.*

29. *See* Breuer, *supra* note 1.

30. *See id.*

31. *See id.*

32. Press Release, Dep't of Justice, N.C. Businessman Pleads Guilty to Role in Foreign Bribery Scheme (Aug. 4, 2010), <http://www.justice.gov/opa/pr/north-carolina-businessman-pleads-guilty-role-foreign-bribery-scheme> [<http://perma.cc/6L6K-A3UU>].

33. Mike Koehler, *Judge (Again) Significantly Rejects DOJ's Recommendation in Sentencing Bobby Elkins*, FCPA PROFESSOR (Oct. 25, 2010), <http://www.fcpaprofessor.com/judge-again-significantly-rejects-doj-recommendation-in-sentencing-bobby-elkins> [<http://perma.cc/D6C6-T6LB>].

shades of gray in conduct that the DOJ portrayed as black and white. Judge Kiser noted it was not illegal for the CIA to routinely bribe Afghan warlords, and, in the words of Judge Kiser, this parallel “sort of goes to the morality of the situation” relevant to the DOJ’s prosecution of Elkin.³⁴ Accordingly, Judge Kiser rejected the DOJ’s sentencing recommendation, sentenced Elkins to probation, and waived the usual probation travel restriction allowing Elkin to return to Kyrgyzstan and resume his job with another tobacco company.³⁵

Judge Kiser’s observation about U.S. government conduct in Afghanistan was prescient. In 2013, a *New York Times* headline read “With Bags of Cash, C.I.A. Seeks Influence in Afghanistan.”³⁶ The article stated:

For more than a decade, wads of American dollars packed into suitcases, backpacks and, on occasion, plastic shopping bags have been dropped off every month or so at the offices of Afghanistan’s president—courtesy of the Central Intelligence Agency. All told, tens of millions of dollars have flowed from the C.I.A. to the office of President Hamid Karzai, according to current and former advisers to the Afghan leader. . . . The C.I.A. . . . has long been known to support some relatives and close aides of Mr. Karzai. But the new accounts of off-the-books cash delivered directly to his office show payments on a vaster scale, and with a far greater impact on everyday governing.³⁷

The above example alone ought to cause pause and reflection regarding whether the United States is truly in a “unique position to spread the gospel of anti-corruption”³⁸ or on the “right side of history.”³⁹ Yet, as highlighted below, U.S. government-sanctioned bribery with public funds is just one example of an uncomfortable truth regarding the U.S. crusade against bribery.

B. U.S. Government Knowledge and Support of Private Sector Bribery

One of the most troubling aspects of the foreign corporate payments problem Congress learned of during the FCPA legislative process was that certain parts of the U.S. government were participants in, or at least enablers of, the very problem Congress was seeking to address. The following exchange during a Senate hearing between Senator Jesse Helms and Lockheed’s Chairman highlights this issue:

Senator HELMS. Do you feel that these bribes or whatever name may be applied to them came as any surprise to the Government of the United States, specifically of the State Department?

...

34. *Id.*

35. *Id.*

36. Matthew Rosenberg, *With Bags of Cash, C.I.A. Seeks Influence in Afghanistan*, N.Y. TIMES (April 28, 2013), [http://www.nytimes.com/2013/04/29/world/asia/cia-delivers-cash-to-afghan-leaders-office.html?pagewanted=all&_r=2&\[http://perma.cc/HZ2T-KNPT\]](http://www.nytimes.com/2013/04/29/world/asia/cia-delivers-cash-to-afghan-leaders-office.html?pagewanted=all&_r=2&[http://perma.cc/HZ2T-KNPT]).

37. *Id.*

38. See Breuer, *supra* note 1.

39. *Id.*

[Lockheed Chairman.] I don't believe they came as any surprise to the State Department or to other branches of the U.S. Government.⁴⁰

Senator Helms then directed the following statement to a State Department official during the hearing:

I certainly don't want to even have the appearance of badgering you, and I don't want to belabor the point, but I am somewhat mystified in the light of all the reports that have come to me, sir, that apparently at the State Department during all of these years when these things were alleged to have occurred, that there was a complete "hear no evil and see no evil."

Now, just tell me this one more time. Nobody at the State Department ever dreamed anything of this sort was going on at any time?⁴¹

Similarly, congressional leaders also viewed the Defense Department as being a participant in, or at an least enabler of, the very problem Congress was seeking to address. Senator Proxmire noted during a Senate hearing:

One of the most disturbing aspects of this is the role the Defense Department has played, especially with respect to defense contractors who sold abroad. We have a document which indicates that at one point a top official in the Defense Department had counseled defense contractors on paying bribes and urged them to do so under circumstances where it was necessary.⁴²

This troubling aspect of bribery and corruption is not a historical relic, but continues in the FCPA's modern era and raises the following question: Is it bribery if the conduct was engaged in with the knowledge and support of the highest levels of the U.S. government?

Consider the case of James Giffen, who was criminally charged with "making more than \$78 million in unlawful payments to two senior officials of the Republic of Kazakhstan in connection with six separate oil transactions, in which [various] American oil companies . . . acquired valuable oil and gas rights in Kazakhstan."⁴³ However, Giffen's defense was that his actions were made with the knowledge and support of the CIA, the National Security Council, the State Department, and the White House.⁴⁴ The DOJ did not dispute that Giffen had frequent contacts with senior U.S. intelligence officials or that he used his ties within the Kazakh government to assist the United States. With the court's approval, Giffen

40. *Lockheed Bribery: Hearings Before the S. Comm on Banking, Hous., and Urban Affairs*, 94th Cong. 55 (1975).

41. *Abuses of Corporate Power: Hearings Before the Subcomm. on Priorities and Econ. in Gov't of the Joint Econ. Comm.*, 94th Cong. 167 (1976).

42. *Foreign and Corporate Bribes: Hearings Before the S. Comm. on Banking, Hous., and Urban Affairs*, 94th Cong. 110 (1976) [hereinafter *Foreign and Corporate Bribes*].

43. Press Release, U.S. Att'y S. Dist. of N.Y., American Businessman Charged with \$78 Million in Unlawful Payments to Kazakh Officials in 6 Oil Transactions; Former Mobil Corp. Executive Indicted for Tax Evasion in Kickback Scheme (Apr. 2, 2003), <http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/04-02-03williams-pressrelease-indict.pdf> [<http://perma.cc/7M2C-F6MY>].

44. See Mike Koehler, *The Giffen Gaffe—The Final Chapter*, FCPA PROFESSOR (Nov. 22, 2010), <http://www.fcpaprofessor.com/the-giffen-gaffe-the-final-chapter> (containing links to original source documents) [<http://perma.cc/RT2K-FFEC>].

sought discovery from the U.S. government to support his public authority defense and much of the delay in the case was due to the government's resistance to providing such discovery.

In 2010, approximately seven years after the enforcement action began, the case took a sudden and mysterious turn when Giffen agreed to plead guilty to a one-paragraph superseding indictment charging a misdemeanor tax violation.⁴⁵ Presiding Judge William Pauley of the Southern District of New York imposed no jail time on Giffen and praised him for advancing U.S. "strategic interests," calling him a Cold War hero and commenting that the enforcement action should never have been brought in the first place.⁴⁶ Giffen himself stated: "Would I do it again? Absolutely. What we were doing was important."⁴⁷

Giffen presumably prevailed over the DOJ not because of the facts or the law, but because he possessed significant leverage over the U.S. government. Indeed, a *Foreign Policy* columnist noted that Giffen's legal team "understood correctly that he could set up a collision between the Justice Department and the CIA in which the latter would probably prevail."⁴⁸ Likewise, a *Harper's Magazine* columnist noted that the Giffen enforcement action had "been the focus of political manipulation concerns for years" and that the end of the case seemed to ratify that view and "[t]he notion of an independent, politically insulated criminal-justice administration in America [took] another severe hit."⁴⁹

The Manas Air Base in Kyrgyzstan provides another relevant example when considering whether bribery occurs if the conduct was engaged in with the knowledge and support of the highest levels of the U.S. government. In 2010, the U.S. House of Representatives held a hearing concerning allegations of corruption in connection with U.S. fuel contracts at Manas Air Base, a critical transit and resupply hub for U.S. military operations in Afghanistan.⁵⁰ The hearing focused on allegations that U.S. contractors who supplied fuel to the air base had significant financial

45. Plea Agreement at 1, *United States v. Giffen*, No. S4 03-WHP-404 (S.D.N.Y. Aug. 6, 2010), <http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/08-06-10giffen-plea-agree.pdf> [<http://perma.cc/5XTP-6JLD>].

46. David Glovin, *Cold War Patriot Defense Helps Giffen Beat Bribe Case*, BLOOMBERG (Dec. 16, 2010), <http://www.bloomberg.com/news/articles/2010-12-16/cold-war-patriot-defense-helps-kazakh-go-between-beat-u-s-bribe-charges> [<http://perma.cc/DF8U-PP3R>].

47. *Id.*

48. Steve Levine, *James Giffen's Trial Ends: A Slap on the Wrist, and the Triumph of American Putinism*, FOREIGN POLICY (Aug. 6, 2010), <http://foreignpolicy.com/2010/08/06/james-giffens-trial-ends-a-slap-on-the-wrist-and-the-triumph-of-american-putinism/> [<http://perma.cc/NY2F-QTRP>].

49. Scott Horton, *Kazakhgate Ends with a Whimper*, HARPER'S MAGAZINE (Aug. 9, 2010), <http://harpers.org/blog/2010/08/kazakhgate-ends-with-a-whimper/> [<http://perma.cc/B6WA-3MAA>].

50. See *Crisis in Kyrgyzstan: Fuel, Contracts, and Revolution Along the Afghan Supply Chain: Hearing Before the Subcomm. on Nat'l Sec. and Foreign Affairs of the H. Comm. on Oversight and Gov't Reform*, 111th Cong. (2010) [hereinafter *Crisis in Kyrgyzstan Hearing*], <http://www.gpo.gov/fdsys/pkg/CHRG-111hhrg65551/html/CHRG-111hhrg65551.htm> [<http://perma.cc/9FJG-B9BC>].

dealings with the family of deposed Kyrgyz President Kurmanbek Bakiyev. In opening the hearing, Representative John Tierney stated:

[L]et's be honest. At many times throughout our history, the United States has closely dealt with unsavory regimes in order to achieve more pressing policy or strategic objectives. That is realism in a nutshell. But the United States also prides itself on a more enlightened view of our role in the world and our long-term interests in universal respect for democracy, the rule of law, and human rights.

Some suggest that the United States has allowed strategic and logistical expedience in Kyrgyzstan to become a lasting embrace of two corrupt and authoritarian regimes. Regardless of U.S. intent, we are left with the fact that both President Akayev and President Bakiyev were forcefully ousted from office amid widespread public perceptions that the United States had supported the regimes' repression and fueled—I say that without any pun intended—their corrosive corruption.⁵¹

During the hearing, witnesses informed the U.S. House of Representatives of “numerous red flags of the sort traditionally used by [the] Department of Justice when looking at bribery cases relating to public contracts” and strongly suggesting that the conduct at Manas involved FCPA violations.⁵²

Specifically, the House learned how various contracts involving U.S. business organizations Red Star and Mina Corp. were structured and how these organizations received in excess of \$1 billion in refuel supply contracts.⁵³ According to the testimony of Scott Horton (who was, among other things, a member of the Board of the National Institute of Military Justice and a member of the Council on Foreign Relations):

[There] are very disturbing questions concerning these companies. They appear to have come out of nowhere with no prior track record of involvement in this sector; the individuals involved with them have copious connections to the U.S. Government, but not really very much to the fuel supply industry; and the contracting relationships themselves are, in a word, extraordinary, not consistent with traditional contracting rule [sic] and approaches.⁵⁴

Relevant to the Manas fuel contracts, the official FCPA Guidance released by the government identifies the following red flags associated with contracting: when a party “is in a different line of business than that for which it has been engaged” and when a party “is related to or closely associated” with government officials.⁵⁵

At the hearing, Horton also testified about the alleged indifference of the DOJ to the alleged corruption at Manas. Horton stated:

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. U.S. DEP'T OF JUSTICE & SEC, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 22 (2012), <http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf> [<http://perma.cc/2UK8-KXW3>].

I also am concerned about the role the U.S. Department of Justice has played in this, because after the 2005 revolution, the Justice Department did come in, did conduct an investigation, and appears to have given a wink and a nod to these arrangements involving Red Star and Mina Corp., and I think that raises serious questions in my mind about their understanding of this contract corruption issue, particularly because this occurs at a time when our Justice Department is telling us that procurement contract fraud is a priority for the Department of Justice. Indeed, they say it is a national security issue. And I don't see how we can reconcile the way they have behaved in this case with those sorts of statements.⁵⁶

It was troubling in the mid-1970's when Congress learned that certain parts of the U.S. government were participants in, or at least enablers of, the very problem Congress was seeking to address. As highlighted by the Giffen and Manas examples, it is even more troubling that this problem appears to persist today and that the U.S. government seems to condone bribery when done with the approval or the wink and nod of one part of the U.S. government.

As highlighted next, it is equally troubling that the identity of the alleged bribe payer influenced the U.S. government's enforcement of bribery laws.

C. Inconsistent U.S. Government Enforcement of Bribery Laws

Equal treatment and absence of discrimination are commonly accepted rule of law principles. These fundamental principles are found in the Organisation for the Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Convention") to which the United States is a party.⁵⁷ Specifically, Article 5 of the OECD Convention states under the heading "Enforcement" that prosecution of bribery offenses "shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved."⁵⁸

However, bribery by companies perceived to be otherwise vital to U.S. strategic interests seemingly violate these rule of law principles in that such companies were not charged with violating the FCPA's antibribery provisions in what can be called bribery, yet no bribery enforcement actions. In addition to the above Giffen and Manas examples—which just as easily could be highlighted in this section—this section examines an enforcement action against BAE Systems.

For years, British defense contractor BAE Systems was under intense scrutiny concerning allegations that it engaged in widespread bribery and corruption, and in 2010, the DOJ filed a criminal information against

56. *Crisis in Kyrgyzstan Hearing*, *supra* note 50, at 44.

57. Organisation of Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions art. 5, Dec. 17, 1997, 37 I.L.M. 1 (1998).

58. *Id.*

BAE.⁵⁹ Among other allegations, the DOJ alleged that BAE “provided substantial benefits” to a Saudi Arabian official who was in a position of influence regarding contracts for military aircraft and related services.⁶⁰ According to the DOJ, BAE provided benefits worth millions of dollars such as the purchase of travel and accommodations, securities services, real estate, automobiles, and personal items through various payment mechanisms both in the territorial jurisdiction of the United States and elsewhere.⁶¹

Despite the above allegations, the DOJ merely charged BAE with one count of conspiracy for “making certain false, inaccurate and incomplete statements to the U.S. government and failing to honor certain undertakings given to the U.S. government, thereby defrauding the United States” and “causing to be filed export license applications with [various U.S. government entities] that omitted a material fact” concerning fee and commission payments.⁶²

In other words, BAE was not charged with FCPA antibribery violations even though among the false statements BAE was alleged to have made to the U.S. government was its commitment not to knowingly violate the FCPA. This was the only mention of the FCPA in the criminal enforcement action despite the above allegations that clearly implicated the FCPA’s antibribery provisions.

A key factor the DOJ considered in resolving the case against BAE in the way it did was the “collateral consequences” that could have resulted from criminal antibribery charges including the risk of debarment and exclusion from government contracts.⁶³ BAE did plead guilty to the charged offenses and agreed to pay a \$400 million fine and thus clearly did not escape liability for its egregious conduct.⁶⁴ Yet, the lack of FCPA antibribery violations against BAE was notable. However, BAE was no ordinary company, but rather a major U.S. government contractor, and the DOJ specifically noted in the charging documents that the company was the largest defense contractor in Europe and the fifth largest in the United States as measured by sales.⁶⁵

In short, the uncomfortable truth of U.S. bribery enforcement is that some of the most egregious FCPA violators, per the DOJ’s own allegations, are also some of the largest and most important U.S. government

59. See Information, *United States v. BAE Systems plc*, No. 10-CR-035-JDB (D.D.C. Feb. 4, 2010), <http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/02-01-10baesystems-info.pdf> [<http://perma.cc/BS4N-CS3L>].

60. *Id.* ¶ 43.

61. *Id.* ¶ 44.

62. *Id.* ¶ 5.

63. See Government’s Sentencing Memorandum, *BAE Systems*, No. 10-CR-035-JDB, <http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/02-22-10baesystems-memo.pdf> [<http://perma.cc/FUE9-XE6D>].

64. See Press Release, Dep’t of Justice, *BAE Systems PLC Pleads Guilty and Ordered to Pay \$400 Million Criminal Fine* (Mar. 1, 2010), <http://www.justice.gov/opa/pr/bae-systems-plc-pleads-guilty-and-ordered-pay-400-million-criminal-fine> [<http://perma.cc/B88T-YPNY>].

65. Information, *supra* note 59, ¶ 1.

contractors or suppliers of goods and services critical to national security. That such companies were not charged with FCPA antibribery violations leaves the impression that certain companies that sell certain products or services to certain customers are immune from FCPA charges.

Even more troubling, business seems to continue as usual despite allegations of egregious bribery. For instance, in the immediate aftermath of the BAE enforcement action, the FBI (the same agency that investigated BAE's conduct and issued a press release stating that "corporations and individuals who conspire to defeat [competition] not only cause harm but ultimately shake the public's confidence in the entire system") awarded the company a \$40 million contract.⁶⁶

The public's confidence in enforcement of bribery and corruption laws is also shaken by the subtle difference between U.S. government and private sector attempts to influence foreign government action.

*D. The Subtle Difference Between U.S. Government
and Private Sector Attempts to Influence Foreign Government Action*

Not all uncomfortable truths regarding the U.S. crusade against bribery are as obvious as the U.S. government providing bags full of cash to foreign government leaders, the highest levels of the U.S. government having knowledge of and supporting private bribery, or the U.S. government not charging strategically important companies with actual FCPA violations. As the below examples demonstrate, the uncomfortable truth is sometimes a bit more subtle.

For instance, during the sentencing of Nam Nguyen, who pleaded guilty to violating the FCPA in connection with payments in Vietnam, the DOJ called to the witness stand Brent Omdahl, the former U.S. commercial attaché from Vietnam, who was asked to testify as to the "seriousness of the offense as it impacts Vietnam."⁶⁷ In his testimony, Omdahl described both how he oversaw a staff of about ten people to deliver services to American companies to help them grow their exports and how he managed an advocacy portfolio in Vietnam to assist U.S. companies in selling directly to the Vietnamese government.⁶⁸ Omdahl testified that his group "constantly advise[d] companies on strategies to enter the market, to bid on government contract [sic], [and] to win business."⁶⁹

Omdahl described Vietnam as a "'corrupt country' and the DOJ presumably expected him to stay on message regarding how corruption in Vietnam [was] not a victimless crime and to describe who suffers from

66. Mike Koehler, *FBI Awards BAE \$40 Million Contract*, FCPA PROFESSOR (Sept. 28, 2010) (quoting Shawn Henry, Assistant Director in Charge of the FBI's Washington Field Office), <http://www.fcpaprofessor.com/fbi-awards-bae-40-million-contract> (containing links to original source documents) [<http://perma.cc/52SF-HRTX>].

67. See Mike Koehler, *Is There a Difference?*, FCPA PROFESSOR (Feb. 9, 2011) (quoting sentencing transcript), <http://www.fcpaprofessor.com/is-there-a-difference> (containing links to original source documents) [<http://perma.cc/S8GR-FXSW>].

68. *Id.*

69. *Id.*

corruption in Vietnam.”⁷⁰ He did that, but Omdahl seemed to drift in his testimony when he stated: “I make no bones about it. It’s very difficult to do business in Vietnam. It’s not very transparent but American companies are making money and there are a number of strategies that companies can follow.”⁷¹ Omdahl was asked, “Is it possible to do business in Vietnam without paying bribes[?]”⁷² He answered, “[I]t is,”⁷³ and one of the strategies he described was the following:

Often [obtaining Vietnamese government business] may require a personal visit by the Ambassador or another high-ranking official to a government official or an official of a state-run enterprise. It could take the form of a letter from a high-ranking U.S. government official to another official in the Vietnamese government or state-owned enterprise.⁷⁴

Omdahl then specifically talked about a \$180 million commercial satellite contract that a Vietnamese “major state-owned enterprise” (SOE) awarded to a U.S. company.⁷⁵ “According to [Omdahl], [the U.S. company] (he described the company as ‘one of our clients’) ‘was in a competitive position to provide a \$180 million commercial satellite to one of the major state-owned enterprises.’”⁷⁶ At this point, the judge asked the DOJ attorney, “[W]hat does this have to do with what you said you were calling this witness to tell us about?”⁷⁷ After an exchange between the judge and the DOJ attorney, Omdahl finished his testimony by saying:

The bottom line is, we have been able to help companies work through. In this particular case, a European country was offering payment with regards to winning the bid but the intervention of the Ambassador with the Chairman of [the SOE] and the Minister of Information Communications, was a critical element to help the company win the business, and they have stated as such.⁷⁸

According to public records, Lockheed Martin was the company that secured the \$180 million contract in Vietnam and it is among the “biggest corporate campaign contributors in U.S. politics.”⁷⁹ Therefore, the following questions arise: Is there a difference between: (a) when a company (or its employees) give something of value to a foreign official to obtain or retain business with a foreign government; and (b) when a company (or its employees) give something of value to U.S. political parties or candidates, or spends millions lobbying the U.S. government, and then the U.S. government assists the company to obtain or retain business with a foreign government?

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

Consider also U.S. diplomats who act as “marketing agents” for U.S. companies and help broker sales with foreign governments. As detailed by the *New York Times*:

The king of Saudi Arabia wanted the United States to outfit his personal jet with the same high-tech devices as Air Force One. The president of Turkey wanted the Obama administration to let a Turkish astronaut sit in on a NASA space flight. And in Bangladesh, the prime minister pressed the State Department to re-establish landing rights at Kennedy International Airport in New York. Each of these government leaders had one thing in common: they were trying to decide whether to buy billions of dollars’ worth of commercial jets from [a U.S. company] or its European competitor, Airbus. And United States diplomats were acting like marketing agents, offering deals to heads of state and airline executives whose decisions could be influenced by price, performance and, as with all finicky customers with plenty to spend, perks. . . . To a greater degree than previously known, diplomats are a big part of the sales force, according to hundreds of cables released by WikiLeaks, which describe politicking and cajoling at the highest levels.⁸⁰

The above examples raise the question of whether there is a difference between the U.S. government using public taxpayer money to offer or to pay a foreign government to induce that government to purchase U.S. company product and a company using private shareholder money to offer or pay a foreign official to induce the government to purchase its product.

Similarly, why does the U.S. government construct programs around the former and call it “foreign military financing” or “foreign military sales” while criminally prosecuting the latter as bribery?⁸¹ As to these questions, as others have noted, “the [U.S.] government wants to give the impression that it is law-abiding and others are not when the same behavior is engaged in” by both and that “when the government itself gives bribes to foreign countries every day, every day of the week, they just call it foreign aid.”⁸²

Do the above examples merely demonstrate that the dividing line between bribery and no bribery is subtle and dependent on the source of the money and influence? Indeed, it has been noted:

It’s not that the United States lacks corruption . . . or even pervasive corruption. It’s just not of the low-level and petty variety like the kind [in certain emerging markets in places like Africa], not most of the time

80. Eric Lipton, *Diplomats Help Push Sales of Jetliners on the Global Market*, N.Y. TIMES (Jan. 2, 2011), http://www.nytimes.com/2011/01/03/business/03wikileaks-boeing.html?_r=0 [<http://perma.cc/L64F-TV7X>].

81. See, e.g., Press Release, SEC, SEC Charges Smith & Wesson with FCPA Violations (July 28, 2014), <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370542384677#.VOInmPnF91Y> [<http://perma.cc/AQ54-U9N8>].

82. *Repeal the Foreign Corrupt Practices Act*, FOX BUSINESS (Apr. 30, 2012), <http://video.foxbusiness.com/v/1612796235001/repeal-foreign-corrupt-practices-act/?#sp=show-clips> [<http://perma.cc/34CM-AN59>].

anyway. In America, corruption is concentrated at the highest levels of society—and it masquerades [under different names].⁸³

Likewise, the subtle differences between foreign bribery and U.S. bribery have been described as follows:

The idea of corruption . . . is simple bribery—cash changing hands. It's the proverbial cash in the piano or the freezer. Corruption is reduced to bribery.

In fact, today's most savvy power brokers are engaged in a kind of corruption that is much more subtle and more difficult to detect. Today's most corrupt players, at least in the West, don't need this quid pro quo corruption. They are far beyond that. That's for the little players. That's for the small fry.⁸⁴

Bribery, however, ought to be bribery pure and simple, and subtle distinctions should not be drawn based on the source of money or influence. Doing so merely creates a distinction without a difference. Indeed, perhaps because of this uncomfortable truth regarding the U.S. crusade against bribery, U.S. government enforcement agencies frequently employ overblown and inconsistent rhetoric when describing FCPA enforcement.

E. The U.S. Government's Overblown and Inconsistent Rhetoric Regarding Bribery Enforcement

While U.S. government agencies that enforce bribery laws appear to be impartial law enforcement agencies, the fact is that such agencies—particularly the DOJ—are also political actors advancing political interests. As long as there has been government, government actors have used rhetoric—no matter how off target—to advance political causes. As highlighted below, a final uncomfortable truth regarding the U.S. crusade against bribery is the often overblown and inconsistent rhetoric of the DOJ in describing its FCPA enforcement program.

For instance, when describing its FCPA enforcement program, the DOJ has frequently invoked the name of Mohammed Bouazizi, the Tunisian man whose act of self-immolation in the face of local corruption was generally viewed as contributing to the Arab Spring. The DOJ has stated, “[T]hrough our FCPA enforcement, we are also sending a signal to ordinary people—to Mohammed Bouazizis across the globe—that we stand with you.”⁸⁵

Surely there were many ordinary people impacted by the U.S. government sanctioning, acquiescing, or not fully prosecuting the examples of bribery highlighted above, yet the U.S. government seemed not “to stand” with them. A recent Ninth Circuit case concerning a Board of Immigration appeal is also relevant to the uncomfortable truth highlighted

83. Lawrence Weschler, *America's Pervasive Pay-Off System*, SALON (Nov. 1, 2011), http://www.salon.com/2011/11/01/america_corruption/ [<http://perma.cc/6MSS-ZETK>].

84. Janine Wedel on the New Corruption, CORPORATE CRIME REPORTER (Jan. 21, 2015, 8:45 AM), <http://www.corporatecrimereporter.com/news/200/janine-wedel-new-corruption/> [<http://perma.cc/TCG5-7TTS>].

85. Breuer, *supra* note 2.

in this section. In a case concerning an Armenian citizen's request for asylum for exposing corruption, which the DOJ opposed, a judge emphasized that the DOJ's position in the case and other immigration cases "clashe[d] with its own campaign against foreign corruption"⁸⁶ and stated "[i]t is unclear why the Justice Department champions the fight against foreign corruption while it simultaneously tries to deport those perceived as fighting foreign corruption."⁸⁷

Moreover, the DOJ frequently links FCPA enforcement to such classical notions of bribery as roads not being built, schools lying in ruins, and basic public services going unprovided.⁸⁸ Such rhetoric certainly has a political and populist appeal, and it is not difficult to construct various hypotheticals in which bribery can lead to such broad-ranging effects.

However, the reality is that FCPA enforcement actions typically involve companies that are widely viewed as industry leaders selling the best product or service for the best price. Raising this common truth of FCPA enforcement is not meant to suggest that industry leaders cannot violate the FCPA—they surely can. Rather, this point is to highlight that a typical FCPA enforcement action does not allege or even remotely suggest that the product or service at issue was compromised, deficient, or capable of causing the broad-ranging effects that the DOJ frequently highlights when describing its FCPA enforcement program.

More recently, the DOJ has described its FCPA enforcement program as "necessary" to protect U.S. national security interests. As stated by the current DOJ Assistant Attorney General:

You may be asking yourself why the U.S. Justice Department is involved in the fight against corruption abroad. . . . The threats posed to the United States by international corruption, however, cannot be overlooked. Foremost, corrupt countries are less safe. Corruption thwarts economic development, traps entire populations in poverty, and leaves countries without a credible justice system. Corrupt officials who put their personal enrichment before the benefit of their citizenry create unstable countries. And as we have seen time and again, unstable countries become the breeding grounds and safe havens for terrorist groups and other criminals who threaten the security of the United States. . . . For all of these reasons, fighting foreign corruption is not a service we provide to the global community, but rather a necessary enforcement action to protect our own national security interests.⁸⁹

86. *Khudaverdyan v. Holder*, 778 F.3d 1101, 1109 (9th Cir. 2015) (Owens, J., concurring).

87. *Id.* at 1110.

88. Lanny A. Breuer, Assistant Attorney Gen. of the Criminal Div., Dep't of Justice, Address at the 26th National Conference on the Foreign Corrupt Practices Act (Nov. 8, 2011), <http://www.justice.gov/criminal/pr/speeches/2011/crm-speech-111108.html> [<http://perma.cc/LJ7B-EC5K>].

89. Leslie R. Caldwell, Assistant Attorney Gen. of the Criminal Div., Dep't of Justice, Address at Duke University School of Law (Oct. 23, 2014), <http://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-speaks-duke-university-school-law> [<http://perma.cc/NR2S-SPSS>].

Surely terrorists and other criminals are corrupt, but it does not therefore follow that enforcement of the FCPA is necessarily linked to U.S. national security. Indeed, the vast majority of corporate FCPA enforcement actions are the result of corporate voluntary disclosures in which the DOJ and SEC merely process the disclosures.⁹⁰

Moreover, there is seemingly no credible and direct link between the bulk of FCPA enforcement actions and U.S. national security interests. For instance, in recent years approximately fifteen corporate FCPA enforcement actions have concerned business relationships with foreign physicians, lab personnel, and even a midwife based on the enforcement theory that such foreign healthcare workers are “foreign officials” under the FCPA and thus similar to Presidents and Prime Ministers.⁹¹ In addition, a substantial percentage of FCPA enforcement actions concern alleged conduct in connection with navigating foreign government bureaucracy in obtaining foreign licenses, permits, and certifications.⁹² Moreover, several FCPA enforcement actions have involved allegations about bottles of wine, kitchen appliances, tea sets, karaoke bars, and flowers.⁹³

Also relevant to the overblown rhetoric of linking FCPA enforcement to national security is the fact that most corporate FCPA enforcement actions concern conduct that allegedly occurred approximately five to seven years prior to the enforcement action and, in certain cases, approximately ten to twenty years prior to the enforcement action when U.S. national security concerns were materially different.⁹⁴

Not only is linking FCPA enforcement to national security overblown, but perhaps most importantly, it is inconsistent with the FCPA’s actual provisions. Indeed, as a matter of law, U.S. national security is a reason *not* to enforce the FCPA.

The FCPA states:

90. See Mike Koehler, *Voluntary Disclosure Statistics*, FCPA PROFESSOR (Dec. 10, 2014), <http://www.fcpaprofessor.com/voluntary-disclosure-statistics> [http://perma.cc/8CZN-TGXQ].

91. See Mike Koehler, *The Origins and Prominence of a Theory*, FCPA PROFESSOR (Sep. 13, 2012), <http://www.fcpaprofessor.com/the-origins-and-prominence-of-a-theory> [http://perma.cc/2QEX-8RD5].

92. See, e.g., Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT’L L. 907, 917–18 (2010) (categorizing enforcement actions concerning licenses, permits, certifications, and the like).

93. See, e.g., Complaint at 7–8, SEC v. Eli Lilly & Co., No. 12-cv-02045 (D.D.C. Dec. 20, 2012), <http://www.sec.gov/litigation/complaints/2012/comp-pr2012-273.pdf> [http://perma.cc/UL3T-W6PR].

94. For instance, an enforcement action against Hewlett-Packard-related entities concerning conduct that occurred for seven to fourteen years in which alleged improper payments were made in selling telecommunications, computer equipment, and other technology products in Russia, Poland, and Mexico. See Cease-and-Desist Order, *In re* Hewlett-Packard Co., No. 71916 (SEC Apr. 9, 2014), <http://www.sec.gov/litigation/admin/2014/34-71916.pdf> [http://perma.cc/ND5F-RAB7]. An enforcement action against an Alcoa entity concerning conduct that occurred for fifteen to twenty years in which alleged improper payments were made in connection with an aluminum smelter project in Bahrain. See Information at 8–10, *United States v. Alcoa World Alumina*, No. 14-CR-00007 (W.D. Pa. Jan. 9, 2014), <http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2014/01/15/01-09-2014information.pdf> [http://perma.cc/5YAF-FSRU].

With respect to matters concerning the national security of the United States, no duty or liability under [certain FCPA provisions] shall be imposed upon any person acting in cooperation with the head of any Federal department or agency responsible for such matters if such act in cooperation with such head of a department or agency was done upon the specific, written directive of the head of such department or agency pursuant to Presidential authority to issue such directives.⁹⁵

Indeed, as highlighted above regarding the Giffen, Manas, and BAE examples, U.S. national security seemed to be a reason *not* to enforce the FCPA *as a matter of practice*.⁹⁶

In short, whether it is the U.S. government being an active participant in bribery, private bribery being engaged in with the knowledge and support of the highest levels of the U.S. government, the U.S. government not enforcing bribery laws against strategically important companies, the subtle difference between U.S. government and private sector attempts to influence foreign government action, or the U.S. government's use of overblown and inconsistent rhetoric regarding bribery enforcement, Part II of this Article highlighted several uncomfortable truths regarding the U.S. crusade against bribery. As highlighted in Part III below, the U.S. crusade against bribery also suffers from several double standards.

III. THE DOUBLE STANDARDS OF BRIBERY ENFORCEMENT

The FCPA was modeled after the preexisting U.S. domestic bribery statute, 18 U.S.C. § 201, and as mentioned above, the government has recognized that it “could not be effective abroad if [it] did not lead by example here at home.”⁹⁷ As the table below shows, both statutes share common core elements.

Core Elements

FCPA	Domestic Bribery Statute
Anything of Value	Anything of Value
To a “Foreign Official”	To a “Public Official”
To “Obtain or Retain Business”	To “Influence Any Official Act”

Despite such similarities, corporate interaction with “foreign officials” seems to be subject to greater scrutiny and different standards of enforcement than corporate interaction with similarly situated U.S. actors. As discussed in this section, this double standard manifests itself in several situations including: (i) a variety of direct and indirect corporate

95. 15 U.S.C. § 78m(b)(3)(A) (2012). That this provision specifically invokes the FCPA's books and records and internal controls provisions but not the FCPA's antibribery provisions would seem to be a scrivener's error.

96. See *supra* notes 43–55 and accompanying text.

97. Breuer, *supra* note 2.

interactions with U.S. political actors; (ii) corporate interaction with U.S. healthcare providers; and (iii) corporate hiring practices.

A. Corporate Interaction with U.S. Political Actors

In recent years, there have been several FCPA enforcement actions concerning corporate payments to foreign political parties and campaigns, corporate lobbying of foreign governments, corporate interactions with foreign law enforcement agencies, and corporate charitable giving.

For instance, several FCPA enforcement actions have alleged payments to Nigerian political parties.⁹⁸ Likewise, an FCPA enforcement action against Titan Corporation concerned allegations that it made “payment of more than \$2 million, through an agent in the Republic of Benin, towards the election campaign of Benin’s then-incumbent President.”⁹⁹

Regarding corporate lobbying of foreign governments, Monsanto resolved an FCPA enforcement action based on allegations that it “hired an Indonesian consulting company” that provided things of value to an Indonesian official to have the Indonesian government “amend or repeal the requirement [in Indonesian law] for an environmental impact statement” before authorizing the cultivation of genetically modified crops.¹⁰⁰

As to corporate interactions with foreign law enforcement agencies, Pride International resolved an FCPA enforcement action based on allegations that company employees indirectly provided things of value to an Indian administrative judicial tribunal judge “to secure a favorable judicial decision for [a branch of a subsidiary] relating to a litigation matter pending before the official.”¹⁰¹

Regarding corporate charitable giving, pharmaceutical companies Schering-Plough and Eli Lilly both resolved FCPA enforcement actions based on allegations that contributions were made to a bona fide Polish foundation dedicated to restoring historic castles.¹⁰² Nevertheless, the

98. See, e.g., Information at 7–8, *United States v. Bilfinger SE* (S.D. Tex. Dec. 9, 2013), <http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2013/12/12/bilfinger-information.pdf> [<http://perma.cc/WVR5-SE65>]; Information, *United States v. Marubeni Corp.*, No. 12-CR-022 (S.D. Tex. Jan. 17, 2012), <http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/01/24/2012-01-17-marubeni-information.pdf> [<http://perma.cc/RFT2-ZUFH>].

99. Press Release, Office of the U.S. Att’y for the S. Dist. of Cal. (Mar. 1, 2005), <http://www.justice.gov/criminal/fraud/fcpa/cases/titan-corp/03-01-05titan-pr-plea.pdf> [<http://perma.cc/FM8E-DUE9>].

100. Press Release, Dep’t of Justice, *Monsanto Company Charged with Bribing Indonesian Government Official: Prosecution Deferred for Three Years* (Jan. 6, 2005), http://www.justice.gov/archive/opa/pr/2005/January/05_crm_008.htm [<http://perma.cc/63UP-XES4>].

101. Information at 14, *United States v. Pride International Inc.*, No. 10-766 (S.D. Tex. Nov. 4, 2010), <http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/11-04-10pride-intl-info.pdf> [<http://perma.cc/Q4DU-UDX6>].

102. Information at 4, *SEC v. Eli Lilly and Co.*, No. 12-cv-02045 (D.C. Cir. Dec. 20, 2012), <https://www.sec.gov/litigation/complaints/2012/comp-pr2012-273.pdf> [<http://perma.cc/JBL9-VVS2>].

government alleged that the foundation was “founded and administered”¹⁰³ by the director of a government health fund who “exercised considerable influence over which pharmaceutical products[,] local hospitals[,] and other healthcare providers in the region purchased.”¹⁰⁴ In a similar FCPA enforcement action, the government alleged that Alstom violated the FCPA by, among other things, making a \$2.2 million payment to “a U.S.-based Islamic education foundation associated with [an alleged ‘foreign official’ with decision-making responsibility].”¹⁰⁵

Against this FCPA enforcement landscape, consider the following examples:

- i. A President is actively seeking and accepting corporate money to fund his inaugural festivities.
- ii. A high-profile corporate executive hosts a \$40,000 per person dinner that raises \$15 million for the President and personally writes a \$2 million check to an organization that is supporting the President.
- iii. Various companies make large donations—some in the millions of dollars—to a family foundation of a high-ranking government official whose office has substantial discretion over pending transactions involving the companies.
- iv. A billionaire business executive bankrolls a high-ranking politician’s campaign, finances the politician’s legislative agenda, and subsidizes the politician’s personal finances.
- v. A pharmaceutical company faces pending government restraints that could negatively affect its business. Thus, the company turns to its lobbyists, who include former chiefs of staff to various current government officials on a key congressional committee. Furthermore, in recent years the company indirectly has given thousands of dollars to current government officials and otherwise made large donations to groups favored by current government officials. Thereafter, the government officials insert a paragraph into a massive spending bill that, while not

103. Complaint, *supra* note 93, at 3; Press Release, SEC, SEC Charges Eli Lilly and Company with FCPA Violations (Dec. 20, 2012), <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171487116#.VOTt3PnF91Y> [<http://perma.cc/E6KC-KFJT>].

104. Complaint, *supra* note 93, at 4; *see* Litigation Release No. 18740, SEC, SEC Files Settled Enforcement Action Against Schering-Plough Corporation for Foreign Corrupt Practices Act Violations (June 9, 2004), <http://www.sec.gov/litigation/litreleases/lr18740.htm> [<http://perma.cc/EV5Q-6EGT>].

105. Information at 23, *United States v. Alstom S.A.*, No. 14-cr-00246-JBA (D. Conn. Dec. 22, 2014), <http://www.justice.gov/criminal/fraud/fcpa/cases/alstomsa/DE-1-Information-for-SA.pdf> [<http://perma.cc/P7LN-65L3>].

specifically mentioning the company, strongly favors one of the company's drugs. The effect of the paragraph in the bill gives the company two additional years to sell the drug without government price controls.

- vi. Various companies, facing various law enforcement investigations, retain paid lobbyists to wine, dine, and make substantial campaign contributions to the chief prosecutors heading up the law enforcement investigations.
- vii. A company makes a \$71,000 charitable donation to an organization in which a public official in its jurisdiction is a longtime board member. For each of the past five years, the same company has given \$25,000 to an institute named for the late mother of another public official who chairs a key congressional committee overseeing the company's industry. In the aggregate over a two-year period, the company gives approximately \$1.6 million to various charities affiliated with lawmakers or executive branch officials. Over the same two-year period, other companies in the same industry also have given in the aggregate approximately \$1.35 million to the same public officials.
- viii. A company learns of potential legislation that will negatively affect its business. Thus, a company representative begs a government official who heads a key congressional committee that will decide the fate of the legislation to vote in a way that serves the company's interest. The company also spends millions to influence the legislative body. The government official reverses his prior position and votes in a way that serves the company's interest. One month later, the company's CEO and the government official appear at an event where the company announces it is making a \$30 million charitable donation—\$11 million of which will benefit schools in the government official's district—the largest gift ever to the city's schools.

A prudent FCPA professional would likely see the red flags in all of the above scenarios and counsel the companies at issue to conduct an internal investigation of the underlying conduct. Indeed, the official FCPA Guidance released by the government states as follows concerning gifts:

An improper benefit can take many forms. While cases often involve payments of cash (sometimes in the guise of "consulting fees" or "commissions" given through intermediaries), others have involved travel expenses and expensive gifts. Like the domestic bribery statute, the

FCPA does not contain a minimum threshold amount for corrupt gifts or payments.¹⁰⁶

The FCPA Guidance further states that companies “cannot use the pretense of charitable contributions as a way to funnel bribes to government officials.”¹⁰⁷

But wait. The government officials in all of the above actual scenarios were not “foreign officials”—they were U.S. government officials!

Example (i) describes President Barack Obama’s 2013 inaugural festivities in which the President’s “finance team [offered] corporations and other institutions that contribute \$1 million exclusive access to an array of inaugural festivities” with different packages offering “differ[ent] levels of access depending on the level of contribution.”¹⁰⁸

Example (ii) describes a movie company executive’s political contributions and close ties to President Obama, including his hosting a campaign event.¹⁰⁹ According to the *Wall Street Journal*, the Executive’s “fundraising prowess has earned him access and a role as the informal liaison between Hollywood and the White House, as the industry continues seeking government help against online piracy” among other issues.¹¹⁰ Of particular note regarding this example, the movie executive’s company, like other Hollywood studios, is currently the subject of FCPA scrutiny concerning potential inappropriate payments and interactions with Chinese government officials with discretion over aspects of the film industry.¹¹¹

Example (iii) concerns allegations raised in a *New York Times* article regarding former Secretary of State Hillary Clinton and numerous donations made to the Clinton Foundation by companies who sought approval from the State Department concerning various business transactions.¹¹²

Example (iv) describes a billionaire’s relationship with U.S. Senator and presidential candidate Marco Rubio. According to the *New York Times*:

[The billionaire] has left few corners of Mr. Rubio’s world untouched. He hired Mr. Rubio, then a Senate candidate, as a lawyer; employed his

106. U.S. DEP’T OF JUSTICE & SEC, *supra* note 55, at 14–15.

107. *Id.* at 16.

108. Sheryl Stolberg, *For Corporate Donors, Inauguration Details*, N.Y. TIMES (Dec. 8, 2012), http://www.nytimes.com/2012/12/09/us/politics/obama-team-outlines-four-corporate-donor-packages-for-inauguration.html?_r=3& [http://perma.cc/2WE6-BJ4D].

109. Peter Nicholas and Erica Orden, *Movie Mogul’s Starring Role in Raising Funds for Obama*, WALL STREET J. (Sept. 30, 2012), <http://www.wsj.com/articles/SB10000872396390443571904577630430778711196> [http://perma.cc/FG8A-W26H].

110. *Id.*

111. See Mike Koehler, *Friday Roundup*, FCPA PROFESSOR (Apr. 27, 2012), <http://www.fcpaprofessor.com/friday-roundup-38> [http://perma.cc/R9GP-THPN].

112. Wilson Andrews, *Donations to the Clinton Foundation, and a Russian Uranium Takeover*, N.Y. TIMES (Apr. 22, 2015), http://www.nytimes.com/interactive/2015/04/23/us/clinton-foundation-donations-uranium-investors.html?_r=3 [http://perma.cc/KR2B-24UC]; see also Michael Patrick Leahy, *Legal Expert on Whether Donations to Clinton Foundation Are Bribes: If It ‘Quacks Like a Duck, Chances Are It Is a Duck’*, BREITBART NEWS (May 29, 2015), <http://www.breitbart.com/big-government/2015/05/29/legal-expert-on-whether-donations-to-clinton-foundation-are-bribes-of-hillary-if-it-quacks-like-a-duck-chances-are-its-a-duck/> [http://perma.cc/6M28-E8MA].

wife to advise the [the billionaire's] family's philanthropic foundation; helped cover the cost of Mr. Rubio's salary as an instructor at a Miami college; and gave Mr. Rubio access to his private plane. The money has flowed both ways. Mr. Rubio has steered taxpayer funds to [the billionaire's] favored causes, successfully pushing for an \$80 million state grant to finance a genomics center at a private university and securing \$5 million for cancer research at a Miami institute for which [the billionaire] is a major donor. Even in an era dominated by super-wealthy donors, [the billionaire] stands out, given how integral he has been not only to Mr. Rubio's political aspirations but also to his personal finances. . . . Pressed on his financial ties to [the billionaire], Mr. Rubio said in an interview that he saw no ethical issue. "What is the conflict?" he asked. "I don't ever recall [the billionaire] ever asking for anything for himself." He acknowledged that [the billionaire] had approached him about state aid for projects, such as funding for cancer research, but said that he had supported the proposals on their merits.¹¹³

Example (v) describes the courting of various members of the Senate Finance Committee by a biotechnology firm. According to the *New York Times*, the company "which has a small army of 74 lobbyists in the capital, was the only company to argue aggressively" for the legislative change.¹¹⁴

Example (vi) describes interactions of various companies with U.S. state attorneys general.¹¹⁵ According to the *New York Times*, "Attorneys general are now the object of aggressive pursuit by lobbyists and lawyers who use campaign contributions, personal appeals at lavish corporate-sponsored conferences and other means to push them to drop investigations, change policies, negotiate favorable settlements or pressure federal regulators."¹¹⁶

Example (vii) describes the charitable giving practice of a major U.S. telecommunications company and other companies in the same industry.¹¹⁷ The *Philadelphia Inquirer* quoted the company spokesperson as saying "[i]t is offensive to suggest our long-term support of community organizations is in any way tied to governmental decisions."¹¹⁸ The article further quoted the U.S. public official whose late mother's institute received the donation

113. Michael Barbaro and Steve Eder, *Business Ties Made by Jeb Bush As Florida Governor Turned Lucrative When He Left Office*, N.Y. TIMES (July 2, 2015), http://www.nytimes.com/2015/07/03/us/business-ties-made-by-bush-as-florida-governor-turned-lucrative-when-he-left-office.html?ref=business&_r=1 [<http://perma.cc/B7T6-7NQ2>].

114. Eric Lipton & Kevin Sack, *Fiscal Footnote: Big Senate Gift to Drug Maker*, N.Y. TIMES (Jan. 19, 2013), <http://www.nytimes.com/2013/01/20/us/medicare-pricing-delay-is-political-win-for-amgen-drug-maker.html> [<http://perma.cc/M3HU-W387>].

115. Eric Lipton, *Lobbyists, Bearing Gifts, Pursue Attorneys General*, N.Y. TIMES (Oct. 28, 2014), http://www.nytimes.com/2014/10/29/us/lobbyists-bearing-gifts-pursue-attorneys-general.html?hp&action=click&pgtype=Homepage&module=first-column-region®ion=top-news&WT.nav=top-news&_r=1 [<http://perma.cc/6HUG-89VH>].

116. *Id.*

117. Jonathan Tamari, *Comcast's Charity Extends to Friends and Potential Foes*, PHILA. INQUIRER (July 29, 2014), http://articles.philly.com/2014-07-29/news/52144872_1_comcast-foundation-sena-fitzmaurice-comcast-officials [<http://perma.cc/Z86Q-HHX3>].

118. *Id.*

as saying, “You don’t seek If you’re in a position like I am, you sometimes get.”¹¹⁹

Example (viii) describes a U.S. company’s potential tax exposure and its interactions with a U.S. public official and his district.¹²⁰ The *New York Times* quoted a company spokesperson who said that the donation “was granted solely on the merit of the project.”¹²¹ For his part, the U.S. public official, who was previously censured “for soliciting donations from corporations and executives with business before his committee,” said “that the donation was unrelated to his official actions.”¹²²

If any of the above scenarios involved “foreign officials,” there would likely be an FCPA investigation of the companies involved. However, because the above scenarios involved U.S. officials, there is a slim chance that the government will investigate any of the above companies though the domestic bribery statute has core elements similar to the FCPA.

But the question is *why*? Some might be inclined to say that while our system is not perfect, that is just how the system works. But why should the government subject business interactions with “foreign officials” to different standards than business interactions with U.S. officials? Why do we reflexively label a “foreign official” who receives “things of value” from private business interests as corrupt, yet generally turn a blind eye when it happens here at home? Is the FCPA enforced too aggressively or is enforcement of the U.S. domestic bribery statute too lax? Ought not there be some consistency between enforcement of the FCPA and the domestic bribery statute?

Indeed, as relevant to the Hillary Clinton example above,¹²³ Secretary of State Clinton remarked:

[T]his Administration, like those before us, has taken a strong stand when it comes to American companies bribing foreign officials. We are unequivocally opposed to weakening the Foreign Corrupt Practices Act. We don’t need to lower our standards. We need to work with other countries to raise theirs.¹²⁴

While pondering these questions, consider that the U.S. Supreme Court has specifically endorsed the legality of the conduct highlighted in several of the U.S. examples above. In both *Citizens United v. FEC*¹²⁵ and *McCutcheon v. FEC*¹²⁶ (cases dealing with various aspects of campaign finance laws), the Supreme Court stated: “Ingratiation and access . . . are

119. *Id.*

120. David Kociensiewski, *G.E.’s Strategies Let It Avoid Taxes Altogether*, N.Y. TIMES (Mar. 24, 2011), http://www.nytimes.com/2011/03/25/business/economy/25tax.html?hp=&pagewanted=all&_r=0 [http://perma.cc/XL6S-B7RP].

121. *Id.*

122. *Id.*

123. See *supra* note 112 and accompanying text.

124. Hillary Clinton, Sec’y of State, Remarks at the Transparency International-USA’s Annual Integrity Award Dinner (Mar. 22, 2012), <http://www.state.gov/secretary/20092013clinton/rm/2012/03/186703.htm> [http://perma.cc/5U4E-82TP].

125. 558 U.S. 310 (2010).

126. 134 S. Ct. 1434 (2014).

not corruption.”¹²⁷ Likewise, the D.C. Circuit recently stated the following about corporate lobbying:

Lobbying has been integral to the American political system since its very inception. . . .

In order to more effectively communicate their clients’ policy goals, lobbyists often seek to cultivate personal relationships with public officials. This involves not only making campaign contributions, but sometimes also hosting events or providing gifts of value such as drinks, meals, and tickets to sporting events and concerts.¹²⁸

However, it is difficult to square the above judicial logic with the allegations in the above FCPA enforcement actions which do equate “ingratiation and access,” *with a certain type of public official*, or providing various things of value to *a certain type of public official*, as corruption.

Indeed, President Jimmy Carter recently termed unchecked political contributions in the United States as “legal bribery of candidates.”¹²⁹ Recall that President Carter signed the FCPA into law in 1977 and was praised for doing so. Why should our reaction to President Carter speaking out about another form of bribery today be any different?

At the very least, the actual U.S. scenarios highlighted above should cause us to pause and reflect whether, in the words of the DOJ, “we in the United States are in a unique position to spread the gospel of anti-corruption”¹³⁰ or on the “right side of history.”¹³¹

B. Corporate Interaction with U.S. Healthcare Providers

As highlighted in Part II, Congress’s main motivation in passing the FCPA was the foreign policy implications of corporate payments to government officials such as the Prime Minister of Japan, the President of the Republic of Korea, the President of Honduras, the President of Gabon, and Italian political parties.¹³²

However, the alleged “foreign officials” in several recent FCPA enforcement actions bear little resemblance to government officials. Rather, the alleged “foreign officials” are physicians, nurses, lab personnel, and others associated with various foreign healthcare systems that are allegedly state owned or state controlled.¹³³ This enforcement theory was first used in an FCPA enforcement action in 2002 and has since become a dominant theory used, in whole or in part, in approximately fifteen

127. *Id.* at 1441 (quoting *Citizens United*, 558 U.S. at 360).

128. *United States v. Ring*, 706 F.3d 460, 463 (D.C. Cir. 2013).

129. Ray Henry, *Jimmy Carter: Unchecked Political Contributions Are ‘Legal Bribery’*, HUFFINGTON POST (July 17, 2013), http://www.huffingtonpost.com/2013/07/17/jimmy-carter-bribery_n_3611882.html [<http://perma.cc/JDW4-MXKR>].

130. *See* Breuer, *supra* note 1.

131. *Id.*

132. *See* Koehler, *supra* note 10, at 934–35.

133. *See* Koehler, *supra* note 91; Mike Koehler, *As Foreign Scrutiny Grows, Dollars Continue to Flow in the U.S.*, FCPA PROFESSOR (Oct. 22, 2014), <http://www.fcprofessor.com/as-foreign-scrutiny-grows-dollars-continue-to-flow-in-the-u-s> [<http://perma.cc/YKM7-KQEB>].

corporate FCPA enforcement actions.¹³⁴ For instance, the following actions included allegations that a company subject to the FCPA provided various things of value to such alleged “foreign officials”:

- An enforcement action against Biomet, Inc. included allegations that the company paid royalties to Argentine physicians and for travel of Chinese physicians.¹³⁵
- An enforcement action against Orthofix International N.V. included allegations that the company provided various gifts such as vacation packages, televisions, and laptops to Mexican healthcare workers.¹³⁶
- An enforcement action against Eli Lilly Co. included allegations that the company provided various gifts such as meals, wine, visits to bath houses, card games, specialty foods, door prizes, spa treatments, cigarettes, and visits to karaoke bars to Chinese physicians.¹³⁷
- An enforcement action against Stryker Corp. included allegations that the company provided travel benefits to Polish and Romanian physicians.¹³⁸
- An enforcement action against Pfizer Inc. included allegations that the company provided travel benefits to Croatian physicians; hospitality, gifts, and support for international travel to Chinese physicians; international travel and recreational opportunities to Czech physicians; and gifts and support for domestic and international travel to Italian physicians.¹³⁹

134. *Id.*

135. See Mike Koehler, *Next Up—Biomet*, FCPA PROFESSOR (Mar. 27, 2012), <http://www.fcpaprofessor.com/next-up-biomet> (containing links to original source documents) [<http://perma.cc/MYS8-8K4U>].

136. See Mike Koehler, *Orthofix International Resolves Enforcement Action Based on the Conduct of Its Mexican Subsidiary*, FCPA PROFESSOR (July 12, 2012), <http://www.fcpaprofessor.com/orthofix-international-resolves-enforcement-action-based-on-the-conduct-of-its-mexican-subsidiary> (containing links to original source documents) [<http://perma.cc/U44H-EJPZ>].

137. See Mike Koehler, *Next Up—Eli Lilly*, FCPA PROFESSOR (Dec. 27, 2012), <http://www.fcpaprofessor.com/next-up-eli-lilly> (containing links to original source documents) [<http://perma.cc/T9PH-4FLW>].

138. See Mike Koehler, *Next Up—Stryker*, FCPA PROFESSOR (Oct. 25, 2013), <http://www.fcpaprofessor.com/next-up-stryker> (containing links to original source documents) [<http://perma.cc/5EZD-ALRM>].

139. See Mike Koehler, *Next Up—Pfizer*, FCPA PROFESSOR (Aug. 8, 2012), <http://www.fcpaprofessor.com/next-up-pfizer> (containing links to original source documents) [<http://perma.cc/H8DA-TGEZ>].

- An enforcement action against Johnson & Johnson included allegations that the company provided travel to medical conventions for Polish physicians as well as travel and other gifts to Romanian physicians.¹⁴⁰

Largely because of the prominent use of nonprosecution agreements (NPAs) and deferred prosecution agreements (DPAs) in resolving corporate FCPA enforcement actions, the above theory that various foreign healthcare workers are “foreign officials” under the FCPA has never been subjected to judicial scrutiny.¹⁴¹ Perhaps most telling as to its validity, the DOJ has never charged an individual based on this FCPA enforcement theory.¹⁴²

In addition to numerous actual FCPA enforcement actions, the theory that physicians, nurses, lab personnel, and others associated with foreign healthcare systems are “foreign officials” under the FCPA is also the reason why several additional companies are the subject of ongoing FCPA scrutiny.¹⁴³

Yet as this *foreign* scrutiny of pharmaceutical and other healthcare related companies continues, the dollars continue to flow to physicians and others associated with U.S. healthcare systems. For instance, in 2014 the *Wall Street Journal* published a series of articles based on information from a new federal government transparency initiative mandated in the 2010 Affordable Care Act that required manufacturers of drugs and medical devices to disclose the payments they make to physicians and teaching hospitals every year.¹⁴⁴ One article reported:

The payments and so-called transfers of value to an estimated 546,000 doctors and 1,360 teaching hospitals include such items as free meals that company sales representatives bring to physicians’ offices, fees paid to doctors to speak about a company’s drug to other doctors at restaurants, compensation for clinical trial research and consulting fees.

Some doctors have earned tens of thousands of dollars annually from drug companies by flying to various cities to give paid speeches, while

140. See Mike Koehler, *Johnson & Johnson Enforcement Action Focuses on Health Care Providers As “Foreign Officials”*, FCPA PROFESSOR (April 11, 2011), <http://www.fcpaprofessor.com/johnson-johnson-enforcement-action-focuses-on-health-care-providers-as-foreign-officials> (containing links to original source documents) [<http://perma.cc/LQT3-WRUU>].

141. To learn more about NPAs and DPAs and how these agreements are the dominant way in which the DOJ resolves corporate FCPA enforcement actions, see Koehler, *supra* note 92.

142. See Koehler, *supra* note 91.

143. See Mike Koehler, *Friday Roundup*, FCPA PROFESSOR (Oct. 10, 2014), <http://www.fcpaprofessor.com/friday-roundup-139> [<http://perma.cc/5L4H-RF6L>].

144. Peter Loftus, *Doctors Net Billions From Drug Firms*, WALL STREET J. (Sept. 30, 2014), <http://www.wsj.com/articles/u-s-agency-reveals-drug-makers-payments-to-doctors-1412100323> [<http://perma.cc/95ZU-SWCM>]; Jeanne Whalen, Joseph Walker & Jonathan Rockoff, *Payments Reveal Range of Doctors’ Ties with Industry*, WALL STREET J. (Oct. 1, 2014), <http://www.wsj.com/articles/payments-show-range-of-doctors-ties-with-industry-1412208328> [<http://perma.cc/S9NQ-KUE6>].

some surgeons received even larger amounts from medical-device makers, partly from royalties on products they helped develop.¹⁴⁵

Another article reported:

Drug and medical-device makers paid \$6.49 billion to U.S. doctors and teaching hospitals during 2014, according to the federal government's first full-year accounting of the breadth of industry financial ties with medical providers.

The tally comprises company payments to more than 600,000 doctors and 1,100 hospitals for services such as consulting, research and promotional speeches about drugs, as well as the value of free meals provided to doctors by sales reps pitching products. . . . Payments for food, beverages, travel and lodging amounted to \$403.64 million, the vast majority of it in in-kind payments. Details of some payments for miscellaneous "entertainment" included a \$65 massage at an airport, Alcatraz tickets and a \$2,000 payment for a training seminar in the Cayman Islands.¹⁴⁶

Things of value are also being provided to U.S. physicians and others associated with U.S. healthcare systems in connection with specific contemplated business transactions. For instance:

As it fights to buy Botox maker Allergan Inc., Valeant Pharmaceuticals International Inc. is investing cash and time wooing the doctors it would need on its side after a takeover.

A centerpiece of the effort: Valeant said it met with a total of 45 influential cosmetic surgeons and dermatologists in September at events in Aspen, Colo., and Palm Beach, Fla. Valeant paid for the physicians' airfares, two-night stays at luxury hotels and meals. The company also agreed to provide consulting fees that could amount to as much as \$30,000, according to doctors who attended the meetings.¹⁴⁷

Many of the above things of value provided to U.S. physicians are obviously similar to those alleged in FCPA enforcement actions involving foreign physicians and other healthcare personnel. So what's the difference between the U.S. conduct and the foreign conduct alleged in several FCPA enforcement actions? If the answer is that the FCPA enforcement actions involved "foreign officials," this is correct to the extent the government *alleged* that physicians and other healthcare workers of various foreign healthcare systems were "foreign officials" even though there is seemingly no legal support for this position. However, given that approximately 20 percent of hospitals in the United States are owned by state or local

145. Loftus, *supra* note 144.

146. Peter Loftus & Joseph Walker, *Drug and Medical-Device Makers Paid \$6.49 Billion to Doctors, Hospitals in 2014*, WALL STREET J. (June 30, 2015), <http://www.wsj.com/articles/drug-and-medical-device-makers-paid-6-49-billion-to-doctors-hospitals-in-2014-1435694053> [http://perma.cc/8NYA-Z4GX].

147. Jonathon Rockoff, *Valeant, Allergan Scuffle for Doctors*, WALL STREET J. (Nov. 12, 2014), <http://www.wsj.com/articles/valeant-allergan-fight-for-doctors-1415839398> [http://perma.cc/5FD3-A6TF].

government,¹⁴⁸ and that an additional 150 medical centers are operated by the Veterans Health Administration,¹⁴⁹ it stands to reason that certain things of value provided to U.S. physicians are to individuals associated with U.S. government-owned or -controlled hospitals.

Yet again one should not hold their breath waiting for enforcement actions under the domestic bribery statute concerning the U.S. payments. Again, the question is *why*? Assuming that foreign physicians and healthcare personnel are indeed “foreign officials” under the FCPA, why should corporate interaction with such “foreign officials” be subject to greater scrutiny and different standards of enforcement than corporate interaction with similarly situated U.S. parties? Indeed, in the minds of some, “the most corrupt health system globally is that in the [United States].”¹⁵⁰ Relevant to the double standard issue highlighted in this section, it has been asked whether the United States should “be policing health care overseas under the guise of the ‘foreign official’ enforcement theory,” or should the United States be “policing it by redefining how businesses operate in the [United States] as a starting point and then applying those standards overseas?”¹⁵¹

The double standard of bribery enforcement manifests itself not only through corporate interaction with U.S. political actors and healthcare providers, but also in connection with corporate hiring practices as highlighted in the next section.

C. Corporate Hiring Practices

As long as there have been public officials, the children of officials have often been valued by private sector employers. This dynamic is present both in the United States and abroad. However, while the former seems to be accepted, recent events have indicated that the latter is often investigated as bribery.

For instance, in August 2013 the *New York Times* reported that “[f]ederal authorities have opened a bribery investigation into whether JPMorgan Chase hired the children of powerful Chinese officials [so-called princelings] to help the bank win lucrative business”¹⁵² As stated in the article:

148. See *Hospitals by Ownership Type*, HENRY J. KAISER FAMILY FOUND., <http://kff.org/other/state-indicator/hospitals-by-ownership/> (last visited Oct. 21, 2015) [<http://perma.cc/GCE2-HVMU>].

149. See *Veterans Health Administration*, U.S. DEP’T OF VETERANS AFFAIRS, <http://www.va.gov/health/findcare.asp> (last updated May 11, 2015) [<http://perma.cc/SWJ3-BRKK>].

150. Guest Post by a Fraud Investigator in the United Kingdom, *The Most Corrupt Health System Globally Is That in the U.S. Unfortunately It Is Also the Most Influential Medical System*, FCPA PROFESSOR (July 21, 2015), <http://www.fcpaprofessor.com/the-most-corrupt-health-system-globally-is-that-in-the-us-unfortunately-it-is-also-the-most-influential-medical-system> [<http://perma.cc/7GDT-JBYV>].

151. *Id.*

152. Jessica Silver-Greenberg, Ben Protess & David Barboza, *Hiring in China by JPMorgan Under Scrutiny*, N.Y. TIMES (Aug. 17, 2013), http://dealbook.nytimes.com/2013/08/17/hiring-in-china-by-jpmorgan-under-scrutiny/?hp&_r=0 [<http://perma.cc/QL63-CNMX>].

In one instance, the bank hired the son of a former Chinese banking regulator who is now the chairman of the China Everbright Group, a state-controlled financial conglomerate After the chairman's son came on board, JPMorgan secured multiple coveted assignments from the Chinese conglomerate, including advising a subsidiary of the company on a stock offering, records show.

The Hong Kong office of JPMorgan also hired the daughter of a Chinese railway official. That official was later detained on accusations of doling out government contracts in exchange for cash bribes, the government document and public records show.

The former official's daughter came to JPMorgan at an opportune time for the New York-based bank: The China Railway Group, a state-controlled construction company that builds railways for the Chinese government, was in the process of selecting JPMorgan to advise on its plans to become a public company, a common move in China for businesses affiliated with the government.¹⁵³

The U.S. government investigation of JPMorgan soon expanded to countries across Asia and involved scrutinizing not only full-time workers, but also company interns.¹⁵⁴ As often is the case in the FCPA context when one company is under investigation, U.S. authorities soon began an industry sweep of other financial services companies and their hiring practices in Asia.¹⁵⁵ Among the other banks publicly reported to be under FCPA scrutiny are: Bank of New York Mellon Corp., Citigroup Inc., Credit Suisse Group AG, Deutsche Bank AG, Goldman Sachs Group Inc., Morgan Stanley, and UBS AG.¹⁵⁶

The FCPA scrutiny of the financial services industry spawned much commentary relevant to double standard issues. A column in the *Economist* noted:

Connections also count in the West, of course. Following initial reports of the SEC's investigation in the *New York Times*, a flood of stories have noted the jobs held in politically sensitive American firms by the sprogs of American politicians. . . .

If the regulators genuinely fret about why firms make hiring decisions, they may want to extend their inquiries to Washington, DC, and New York as well.¹⁵⁷

153. *Id.*

154. Dawn Kopecki, *JPMorgan Probe Expands in Asia, Spreadsheet Found*, BLOOMBERG (Aug. 28, 2013), <http://www.bloomberg.com/news/articles/2013-08-29/jpmorgan-bribe-probe-said-to-expand-in-asia-as-spreadsheet-found> [<http://perma.cc/YCY9-3ZFJ>].

155. See Robin Sidel & Cynthia Koons, *U.S. Overseas Hiring Probe Has Wide Net*, WALL STREET J. (Aug. 29, 2013), <http://www.wsj.com/articles/SB10001424127887324324404579043382418965094> [<http://perma.cc/YP8A-HUTK>].

156. See Mike Koehler, *Wall Street Firms Push Back Against FCPA Scrutiny*, FCPA PROFESSOR (May 5, 2015), <http://www.fcpaprofessor.com/wall-street-firms-push-back-against-fcpa-scrutiny> [<http://perma.cc/5M8Q-VX9E>].

157. *Blood and Money*, THE ECONOMIST (Aug. 24, 2013), <http://www.economist.com/news/finance-and-economics/21584033-american-regulators-investigate-jpmorgan-chases-hiring-china-blood-and-money> [<http://perma.cc/4TXV-P4G7>].

A column in the *New York Times* likewise noted, “[H]iring the sons and daughters of powerful executives and politicians is hardly just the province of banks doing business in China: it has been a time-tested practice here in the United States.”¹⁵⁸

Some of the most forceful commentary came from respected former high-ranking U.S. officials. For instance, former SEC Commissioner Arthur Levitt penned a column in the *Wall Street Journal* calling the FCPA scrutiny of the financial services industry “scurrilous and hypocritical.”¹⁵⁹ In pertinent part, Levitt stated:

[A]ccording to financial regulators now looking into the hiring practices of major U.S. banks and multinationals in China—some of which have employed members of influential Chinese families—anyone who once hired me [(Levitt’s father was the New York State Comptroller)] might have been violating ethical and legal standards. Securities and Exchange Commission regulators now suggest that such hiring overseas is a form of untoward influence, akin to bribing foreign officials to win business. The accusation is scurrilous and hypocritical. If you walk the halls of any institution in the U.S.—Congress, federal courthouses, large corporations, the White House, American embassies and even the offices of the SEC—you are likely to run into friends and family members of powerful and wealthy people. . . . Whether this is right or wrong, unfair or fair, is not the point. It is hypocritical of financial regulators to criticize—even penalize—practices abroad that are commonplace in Washington, New York and other seats of political and economic power. Were the SEC to be completely consistent in its approach, it would have to come down hard on the same practices here in the U.S. And the agency would have a field day. Members of Congress and the executive branch regularly hire the children of major donors.¹⁶⁰

Former Labor Secretary Robert Reich was equally forceful. In a *Huffington Post* column, Reich stated:

[L]et’s get real. How different is bribing China’s “princelings,” as they’re called there, from Wall Street’s ongoing program of hiring departing U.S. Treasury officials, presumably in order to grease the wheels of official Washington? . . . Or, for that matter, how different is what JP Morgan did in China from Wall Street’s habit of hiring the children of powerful American politicians?¹⁶¹

Indeed, there are numerous examples of children of powerful American politicians securing lucrative jobs and other positions. For example, consider Chelsea Clinton (the only child of former President Bill Clinton

158. Andrew Ross Sorkin, *Hiring the Well-Connected Isn’t Always a Scandal*, N.Y. TIMES (Aug. 19, 2013), http://dealbook.nytimes.com/2013/08/19/hiring-the-well-connected-isnt-always-a-scandal/?ref=business&_r=0 [http://perma.cc/8X5C-839R].

159. Arthur Levitt, ‘Influence Peddling’ Makes the World Go Round, WALL STREET J. (Dec. 25, 2013), http://www.wsj.com/news/articles/SB10001424052702304858104579262624243252560?mod=WSJ_Opinion_LEFTTopOpinion [http://perma.cc/6Q68-VBQV].

160. *Id.*

161. Robert Reich, *JP Morgan Chase, the Foreign Corrupt Practice Act, and the Corruption of America*, HUFFINGTON POST (Dec. 8, 2013), http://www.huffingtonpost.com/robert-reich/jp-morgan-corrupt-practice-act_b_4410253.html [http://perma.cc/8NX7-PJHT].

and Hillary Clinton, among other things the former Secretary of State and current Presidential candidate). Upon graduating from college, Ms. Clinton worked first at McKinsey & Co., a prestigious management consulting firm, and thereafter at Avenue Capital Group, a hedge fund run by an individual close to the Clinton family and a long-time donor to Democrats.¹⁶² Next, Ms. Clinton was appointed a corporate director at IAC/InterActiveCorp, a media company controlled by an individual who supported both President Bill Clinton's and Hillary Clinton's presidential campaigns.¹⁶³ As a corporate director, Ms. Clinton reportedly was paid \$50,000 per year and the company granted her \$250,000 worth of company shares.¹⁶⁴ Most recently, Ms. Clinton (an individual with no apparent professional journalism experience) was hired as a "special correspondent" at NBC News and reportedly received an annual salary of \$600,000.¹⁶⁵

Consider also Jeb Bush (the son of former President George H.W. Bush, the brother of former President George W. Bush, and also the former Governor of Florida and current Presidential candidate). As recently highlighted by the *New York Times*:

As Mr. Bush sought to create a personal fortune for himself and his family after eight years in public office, he found a ready source of income: speeches sponsored by corporations and industry trade groups, including some that benefited from his administration's policies.

Since 2007, Mr. Bush has delivered about 260 paid speeches, earning around \$10 million in the process, according to records provided this week by his presidential campaign. The speeches, combined with his consulting and investment businesses, rapidly transformed his finances: His and his wife's net worth soared to at least \$19 million from \$1.3 million over the past eight years.

The wealth he amassed from the speaking circuit pales in comparison to that collected by Hillary Rodham Clinton, a Democratic candidate. But it underscores the ease with which political figures can turn their public prominence into private riches.¹⁶⁶

Notably, the recent release of Jeb Bush's tax returns reveals that "[o]ver about six years as an adviser for the defunct Wall Street bank Lehman Bros. and later Barclays PLC, Mr. Bush earned, on average, between \$1.3 million and \$2 million."¹⁶⁷

162. See Reuters, *Chelsea Clinton Joins New York Hedge Fund*, NBC (Nov. 3, 2006), http://www.nbcnews.com/id/15549672/ns/business-us_business/t/chelsea-clinton-joins-new-york-hedge-fund/#.VaGIEflViko [http://perma.cc/2P3E-RR3P].

163. See Peter Lattman, *Chelsea Clinton Joins Board of Diller's IAC*, N.Y. TIMES (Sept. 26, 2011), http://dealbook.nytimes.com/2011/09/26/chelsea-clinton-joins-board-of-iac-interactive/?_r=0 [http://perma.cc/8RW6-WWMA].

164. *Id.*

165. See Sophia Rosenbaum, *Chelsea Clinton Is Making Bank at NBC*, N.Y. POST (June 13, 2014), <http://nypost.com/2014/06/13/chelsea-clinton-is-making-bank-at-nbc/> [http://perma.cc/FB5W-RCFB].

166. Barbaro & Eder, *supra* note 113.

167. Beth Reinhard, Christopher S. Stewart & Rebecca Ballhaus, *Jeb Bush Releases 33 Years of Tax Returns*, WALL STREET J. (July 1, 2015), <http://www.wsj.com/articles/jeb-bush-releases-33-years-of-tax-returns-1435698068> [http://perma.cc/7KQB-EWKZ].

In response to the FCPA scrutiny of the financial services industry concerning alleged hiring practices of family members of foreign officials, FCPA practitioners published client alerts and other publications regarding best practices.¹⁶⁸ The following best practices were rightly noted:

- “Check the educational and professional qualifications of the individual being considered for employment and ensure that they are appropriate for the position being filled. Evidence that a relative of a government official was hired into a position for which he or she was not qualified will likely result in a finding that they were hired for improper purposes.”¹⁶⁹
- “Ensure that the salary and treatment given to the relative of the government official is commensurate with the position and consistent with other individuals in a similar position. Evidence that the relative of the government official is receiving a salary significantly higher than other individuals at a similar level and occupying similar positions suggests the additional funds may be provided to influence the related government official.”¹⁷⁰
- “Confirm that the position was not created specifically for the relative of the government official. Evidence that the position was created for a specific person will suggest that the company’s sole purpose in hiring the individual was to gain influence with the government official.”¹⁷¹
- “An individual whose sole qualification for a prestigious Wall Street gig is a powerful mother or father in the . . . government should raise red flags.” If an individual “is not otherwise qualified for the position at [a] financial services company, the DOJ and SEC will ask about the basis for the hiring.”¹⁷²

If the above best practices questions were asked in connection with Chelsea Clinton’s various positions or Jeb Bush’s adviser positions with Wall Street banks, what would the answers be?

168. See, e.g., RICHARD CRAIG SMITH, PAUL EDWARD SUMILAS & KATE HUNTER, NORTON ROSE FULBRIGHT, *HIRING A PROBLEM: AVOIDING THE PITFALLS OF EMPLOYING RELATIVES OF GOVERNMENT OFFICIALS* (2013), <http://www.nortonrosefulbright.com/knowledge/publications/104411/hiring-a-problem-avoiding-the-pitfalls-of-employing-relatives-of-government-officials> [http://perma.cc/4X8R-CFM2]; Max Stendahl, *5 Tips to Thwart FCPA Scrutiny of Hiring Practices*, LAW360 (Sept. 4, 2013), <http://www.law360.com/articles/469505/5-tips-to-thwart-fcpa-scrutiny-of-hiring-practices> [http://perma.cc/84FA-KWAW].

169. Smith et al., *supra* note 168.

170. *Id.*

171. *Id.*

172. Stendahl, *supra* note 168.

In short, there are princelings in the United States as well as individuals who bounce in and out of politics and “private” life so often that they are effectively part of the political class regardless of the precise moment in time in which the question is posed. Returning to former Labor Secretary Reich’s observations about the FCPA scrutiny of the financial services industry, Reich asked, “The Foreign Corrupt Practices Act is important . . . and JP Morgan should be nailed for bribing Chinese officials. But, if you’ll pardon me for asking, why isn’t there a Domestic Corrupt Practices Act?”¹⁷³

As highlighted above, there is indeed a “domestic corrupt practices act”—it is called 18 U.S.C. § 201 and it has similar core elements to the FCPA. Time will tell whether the industry sweep of Asian hiring practices of financial services companies results in any FCPA enforcement actions.¹⁷⁴ However, it is safe to assume that there will be no domestic bribery prosecutions based on similar corporate hiring practices in the United States.

CONCLUSION

The goal of this Article was to highlight various case studies and examples so that readers can decide for themselves whether the U.S. crusade against bribery suffers from several uncomfortable truths and double standards. This is not just a legal issue, but also a policy issue that goes to the heart of the legitimacy and moral authority on which the United States acts. Indeed, the policy reasons motivating Congress to enact the FCPA—that corporate payments were subverting the democratic process, undermining the integrity and stability of government, and eroding public confidence in basic institutions—apply with equal force to domestic bribery.

At the very least, the above case studies and examples should cause readers to pause and reflect on whether the United States is indeed in a “unique position to spread the gospel of anti-corruption”¹⁷⁵ or on the “right side of history.”¹⁷⁶ Some readers may view merely posing such questions as provocative.

The truth, however, is that similar questions were asked during the FCPA’s passage in 1977 as Congress quickly learned that corporate bribery

173. Reich, *supra* note 161.

174. At present, Bank of New York Mellon has reportedly received a Wells Notice from the SEC concerning an anticipated enforcement action. See Mike Koehler, *Friday Roundup*, FCPA PROFESSOR (Jan. 30, 2015), <http://www.fcpaprofessor.com/friday-roundup-149> [<http://perma.cc/P8BM-UTLY>]. Even if there is no actual enforcement action, the companies under investigation have likely spent millions of dollars responding to the U.S. government investigation and may also have lost hundreds of millions of dollars in potential business because of excessive risk aversion. See generally Mike Koehler, *Foreign Corrupt Practices Act Ripples*, 3 AM. U. BUS. L. REV. 391 (2014).

175. See Breuer, *supra* note 1.

176. *Id.*

was not the “simple, safe issue it seem[ed] at first blush.”¹⁷⁷ Moreover, the FCPA’s legislative history teaches that “trying to define exactly what bribery is is a real problem” and that “in certain instances, we have a gray area when it comes to this bribery question.”¹⁷⁸ The FCPA’s legislative history further instructs that there will be “countless situations” in which fair-minded individuals “will be hard-put to determine whether a particular payment or practice is a legitimate and permissible business activity or a means of improper influence,”¹⁷⁹ and it was further noted that reasonable persons “and even angels will differ on the answers . . . [and] such distinctions should make us less sweeping in our judgments and less confident in our solutions.”¹⁸⁰

If anything, the persistent and lingering questions about bribery are more pressing today given the current U.S. crusade against bribery—or *at least bribery of a certain type*. As highlighted in this Article, however, “corruption is universal, and one has to be very careful when one takes a very righteous position.”¹⁸¹

177. *Foreign Payments Disclosure*, *supra* note 16, at 2 (citing Theodore C. Sorensen, *Improper Payments Abroad: Perspectives and Proposals*, 54 FOREIGN AFFAIRS 719, 719 (1976)).

178. *Foreign and Corporate Bribes*, *supra* note 42, at 46 (statement of William Simon, U.S. Sec’y of the Treasury).

179. *Foreign Payments Disclosure*, *supra* note 16, at 2 (citing Sorensen, *supra* note 177, at 719).

180. *Id.*

181. ARUNA VISWANATHA, MAIN JUSTICE, DEVELOPING COUNTRIES IRKED BY CORRUPTION LABEL (2010) (quoting Selim Jahan, Director, Poverty Practice, United Nations Development Programme) (on file with the *Fordham Law Review*).